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No. 94-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1993

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL PLASTICS, INC.,
and GEORGE R. LEES,

Petitioners,

v.

MICHAEL LADNEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 3, 1994

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit erred in affirming the decision of a district court that awarded Respondent a default judgment against each of the three Petitioners as a discovery sanction by reason of one of them failing to provide a demonstration of operating equipment, where the allegedly infringing equipment was available for inspection but was not connected with other more expensive equipment not manufactured by Petitioners, and where there was no written order defining what constituted a complete response to the discovery request.

PARTIES TO THE PROCEEDING

Petitioners (Defendants-Appellants below):

Encore Systems, Inc., a Michigan corporation having a place of business in Mt. Clemens, Michigan;

Vanguard Industrial Plastics, Inc., formerly a Michigan corporation, now inactive (Petitioner Vanguard was a subsidiary of Lees Enterprises, a Michigan corporation); and

George R. Lees, an individual having a residence in the State of Florida.

Respondents (Plaintiff-Appellee below):

Michael Ladney, an individual having a residence in the State of Florida.

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

Encore Systems, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINION BELOW

The Order of the United States Court of Appeals for the Federal Circuit on Docket No. 93-1232 was decided and entered on October 28, 1993. This Order affirmed the district court's default judgment of liability of February 3, 1992, and reversed the district court's order accepting a magistrate judge's report and recommendation that the doctrine of collateral estoppel be applied to tortious interference claims based on the judgment of a state court case.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1993. The mandate of the court of appeals was issued on December 10, 1993, and petition for rehearing was denied on December 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

PROVISIONS OF STATUTES AND REGULATIONS

Rules 30(b)(6), 37(a)(2), 37(b)(2)(C), and 37(d) of the Fed. R. Civ. P.; 35 U.S.C. Sections 271(a) and 271(b).

STATEMENT OF THE CASE

The Petitioner George R. Lees is an individual having a residence in the State of Florida. The Petitioner Encore

Systems, Inc., is a Michigan corporation having a place of business in Mt. Clemens, Michigan. Prior to being named a defendant in the proceedings below, Encore manufactured and sold, among other things, equipment for injecting a gas into the center of a melt stream of a polymerizable material as it enters and fills a mold. Encore held patents related to this technology. Petitioner Vanguard Industrial Plastics, Inc., was a Michigan corporation that is not longer active. Respondent Michael Ladney is an individual having an address in the state of Florida. Mr. Ladney is also involved in the injection molding industry and holds patents related to this technology.

A. The District Court Findings

On April 26, 1989, Respondent filed suit against the Petitioners and also against a fourth defendant, Stork Plastics Machinery B.V. (Stork settled its dispute with Respondent in 1989.) The complaint, as it was subsequently amended, was based upon two counts. The first count established federal jurisdiction and was under 35. U.S.C. Sections 271(a) and 271(b) alleging that Petitioners infringed United States Patent No. 4,781,554, issued to James W. Hendry and assigned to Michael Ladney. The '554 patent is directed to an apparatus for the injection molding of thermoplastics. The alleged infringing activity was the making, using and selling of the invention claimed in the '554 patent. The second count alleged that

there was a tortious interference by Petitioners with a certain license agreement between a Mr. Indra Baxi (as licensor), an individual who was never a party to the federal case from which this appeal is taken, and a Mr. James W. Hendry (as licensee), an individual who was also never a party to the federal case. Mr. James W. Hendry had assigned his rights in the Baxi license agreement to Respondent Ladney. Subsequent to the assignment of the license agreement by Mr. Hendry to Mr. Ladney, there was a dispute over Mr. Baxi's performance under the agreement, and Mr. Ladney sued Mr. Baxi in a breach of contract action in a state court in Michigan. That suit was filed in September of 1988. A judgment of $2,250,000.00 was rendered in favor of Mr.

Ladney and against Mr. Baxi in September of 1991.

On May 22, 1989, Petitioners served their answer to the original complaint and denied any acts of infringement.

On October 2, 1989, in response to Plaintiff's Motion to Compel Discovery of Defendant Encore Systems, Inc., and Plaintiff's Motion Under Rule 37(a)(2) for an Order Compelling Answers and Responses, Magistrate Binder entered an order that ordered Petitioner Encore (and only Encore) to produce requested information within thirty days. Respondent's request for sanctions was denied because Magistrate Binder did "not find the willfulness necessary to justify an award of sanctions".

On February 2, 1990, Magistrate Charles Binder entered an Order (against Petitioner Encore only) in which he ordered that certain ones of outstanding interrogatories be answered. Sanctions were not imposed and Respondent's request for attorney fees was denied.

On April 2, 1990, Petitioners Encore, Lees and Vanguard filed their answers to Respondent's first request for production of documents.

On April 17, 1990, Magistrate Binder made a recommendation, in response to Plaintiff's Motion for Default Judgment Under Rule 37(b)(2)(C) against Petitioner Encore, that the request be denied, but that Petitioners' former counsel be "required to pay the costs of plaintiff's

counsel attributed to the bringing of this motion for sanctions".

On May 1, 1990, Respondent filed an amended complaint as discussed above that additionally alleged that Petitioners tortiously interfered with a November 5, 1986 license agreement entered into between Mr. Indra Baxi and Mr. James Hendry.

On May 31, 1990, Petitioners served their answer to the amended complaint and denied any acts of infringement or tortious interference.

On June 1, 1990, Petitioners Encore, Vanguard and Lees filed a motion to extend time for filing discovery with an affidavit and brief in support.

On July 18, 1990, Petitioner Lees filed his answers to Respondent's first set of requests for admission.

On July 25, 1990, Judge Harvey entered an order adopting Magistrate Binder's recommendations.

On August 30, 1990, Magistrate Binder entered an Order that, with respect to Petitioner Lees, stated:

> Pursuant to the agreement of counsel, counsel for Encore shall, no later than Wednesday, September 6, 1990, forward a letter to counsel for plaintiff, with a copy to this Magistrate, listing the dates as to when discovery matters with regard to George Lees will be completed.

In early September 1990, Respondent filed his notice of the taking of the deposition of Petitioner Lees. That deposition occurred on September 28, 1990. It is not entirely clear from the record

in the hands of the present counsel for Petitioners (most of the documents exchanged and received prior to present counsel's involvement were retained by former counsel), but it appears that there was not a problem in scheduling or conducting this deposition. (It should be noted that the August 30 Order of Magistrate Binder is more concerned with the deposition of Indra Baxi, the defendant in the state court case, over whom Petitioners never had control. The only other deposition activity in this case was a 30(b)(6) type deposition noticed for Petitioner Encore. This deposition was cancelled by mutual agreement of the parties.)

On September 14, 1990, Petitioner Lees filed his answers to

Respondent's first set of interrogatories and request for production of documents.

On November 2, 1990, Judge Harvey entered an Order enforcing the Order of July 25, 1990.

(In mid-December 1990, present counsel for the Petitioners became involved in this case.)

On January 8, 1991, Respondent's counsel sent counsel for Petitioners a letter by facsimile that served to "bring to [counsels'] attention numerous deficiencies in the production of documents by defendant Encore Systems, Inc. in this suit". Petitioner Encore responded in a timely manner and without further incident by producing what it had, including documents related to the Encore-Baxi License Agreement, all Stork

communications (about 200 pages), and the Robust Plastik License. A miscellany of parts of the manufacturer KMMCO were also made available for inspection and photographs were sent. No other requested documents were in the possession of either Petitioners or their replacement counsel. Petitioner Encore fully complied to the extent of its ability to Respondent's request.

This is the complete record of pre-inspection discovery as best can be recreated by Petitioners from the documents in their possession and based upon the court docket.

During an in-chambers conference of January 25, 1991, counsel for Respondent expressed the need to inspect an operating unit. Counsel for

Petitioners said he would talk with the clients about arranging the requested inspection. Respondent noticed the inspection for February 20, 1991. Petitioners confirmed the inspection. On the day of the inspection, while the allegedly infringing equipment was available, it was not connected to any injection molding machine and, therefore, was not operable. An injection molding machine was not a part of the equipment sold by Petitioners and is a large and expensive piece of equipment. Petitioners did not have access to an injection molding machine. There was a confrontation between Petitioner Lees and Respondent Ladney. Mr. Lees, under duress from the litigation and personal health problems, had imbibed some alcohol prior

to the inspection. In that state and out of obvious anger, he said to Respondent Ladney that he should punch him.

In spite of the problems of the inspection, Petitioners did not completely fail to answer the request. The heart of the alleged patent infringement relates to a unit called a "sprue bushing adapter". The sprue bushing adapter has a series of passages for gas and allows the user to gas the plastic using a convention plastic injection molding machine having a non-gassed nozzle. The adapter is disposed between the molding machine and the sprue bushing of a mold. This is different from the patent-in-suit, the '554 patent, which covers a novel nozzle and molding machine that includes a network of passages for gas. Among other parts, the sprue bushing adapter was available at the time and

place of the inspection and an inspection of this piece of equipment would have told Respondent that Petitioners were not infringing the '554 patent.

On February 25, 1991, Respondent filed his Motion For Sanctions for Defendants' Refusal to Provide Discovery. The motion was made pursuant to Rule 37(d). In the brief in support of this motion, Respondent focused in part on what he called "Defendants' History of Discovery Abuse", and set forth, in addition to the specified selected conduct, the "abuse" represented by two discovery orders ordering Indra Baxi to appear for depositions on two occasions. Whether intentional or not, this was damaging to Petitioners in that Mr. Baxi was <u>never</u> a party to the federal case and Petitioners <u>never</u> had control over his

actions and, therefore, the failure of Indra Baxi to appear for depositions was in no way the fault of Petitioners.

The decision on the Motion was assigned to Magistrate Charles Binder. On March 15, 1991, Magistrate Binder issued his Report and Recommendation recommending that Respondent's motion be granted and that a default judgment be entered "against the defendant".

The Magistrate was successfully misled by what he must have concluded was Petitioners failure to control Mr. Baxi, as he held the failure of Mr. Baxi to appear for a deposition against Petitioners as set forth on page 4 of his Report.

On January 31, 1992, the trial court accepted the recommendations of the Magistrate.

Thereafter, the only issue remaining to be litigated was the issue of damages. During an in-chambers discussion of December 18, 1991, the trial court asked the Respondent and Petitioners to brief the issue of the possible impact of res judicata or collateral estoppel on the suit by the litigated state court case of Ladney v. Baxi. As mentioned briefly above, this case was a dispute between Respondent and Mr. Baxi, an individual employed by Petitioner Encore between December 1, 1987, until his resignation on April 13, 1989. The effect of res judicata and collateral estoppel was briefed by both sides.

On April 8, 1992, Respondent subsequently filed a motion for the application of the doctrine of collateral

estoppel to the tortious interference claims based on the judgment in Ladney v. Baxi, and the issue was again referred to Magistrate Charles Binder for resolution. The Magistrate recommended that the Petitioners be collaterally estopped based on the state court case, and the trial court accepted the recommendation and entered judgment on January 20, 1993, in the amount of $2,250,000.00.

B. **The Findings of the Court of Appeals for the Federal Circuit**

On February 12, 1993, Petitioners filed their Notice of Appeal. Petitioners' Brief was filed with the Court of Appeals for the Federal Circuit on May 7, 1993. A corrected Petitioners' Brief was filed with that Court on May 14, 1993. Respondent's Brief was thereafter

filed and dated June 17, 1993. Petitioners' filed a Reply Brief with the Court on July 7, 1993. Oral arguments were held on August 30, 1993 and were attended by representatives of all the parties.

On October 28, 1993, the Court of Appeals announced its judgment. The Court affirmed the order of default of liability and vacated the lower court's award of $2,250,000 and remanded the case to the district court to determine damages.

REASONS FOR GRANTING WRIT

There are at least three reasons for granting the present petition for writ of certiorari. The first is that the court of appeals rendered a decision that is inconsistent with decisions of the 6th

Circuit, that circuit which controls. The second is that the Court of Appeals rendered a decision that is inconsistent with decisions of the U.S. Supreme Court. The third is that courts of appeal have rendered inconsistent decisions when resolving disputes involving the requirement of an order under Federal Rule of Civil Procedure 37(b), thus requiring the Supreme Court to exercise its power of supervision to thereby clarify and harmonize to the extent possible the application of this important Federal rule.

A. **Decision Inconsistent With Sixth Circuit**

The Petitioners were defaulted under Fed. R. Civ. P. 37(b)(2)(C). This section provides the following:

> Rule 37. Failure to Make or Cooperate in Discovery:

> Sanctions * * *
> (b) Failure to Comply With Order.
> * * *
> (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> * * *
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

The rule requires that an order be in place prior to the grant of a default. No order was ever in place, nor was there even a motion for such an order, yet Petitioners were defaulted in spite of this defect.

The judgment of the Court of Appeals for the Federal Circuit runs contrary to the findings of the Sixth Circuit, which the Court of Appeals acknowledged in its decision of October 28, 1993, that regional circuit law is applied when reviewing Fed. R. Civ. P. 37(b) discovery sanctions.

A default judgment can be even more devastating than a dismissal. Generally, in the Sixth Circuit, factors to be considered in reviewing a District Court's sanction under Rule 37(b) include:

> whether the adversary was prejudiced by the dismissal [or defaulting] party's failure to cooperate in discovery, whether the dismissal [or defaulting] party was warned that failure to cooperate could lead to dismissal [or default], and whether less drastic sanctions were imposed or considered before dismissal [or default] was ordered. Regional Refuse Systems, Inc., v. Inland Reclamation Co., 842 F.2d 150, 155 (6th Cir. 1988).

The appeals court ignored or misapplied the Sixth Circuit's requirements. Specifically, it is not likely that Respondent was prejudiced by the inspection he contends was not conducted in the manner that it should have been - by his own acknowledgement in a letter of December 21, 1988, to Petitioner Lees, Respondent personally inspected the "Encore" process. And at the inspection itself he could tell from the equipment that was available whether or not Petitioners were infringing his patent. With respect to the warning required prior to imposition of the default judgment that a failed inspection would lead to default, there was none. Finally, there is no evidence that less drastic sanctions were considered and certainly none were imposed. The Court of

Appeals for the Federal Circuit certainly did not apply the controlling law, or, if it did apply the law, did not do so correctly.

In addition to the failure to apply the Regional Refuse Systems case, the appeals court apparently overlooked In Re LaMarre, 494 F.2d 753 (6th Cir. 1974), in which an individual appealed a decision finding him in contempt for not obeying an alleged order. In this case a settlement appeared in the offing, so the district judge thought that a little encouragement would do the trick. A settlement amount was on the table, but Defendant LaMarre, a claims manager of the insurance company involved in the suit, did not agree with the figure.

> To expedite matters, the court several times directed the attorneys employed by the insurer to contact LaMarre and request his presence at

> conferences. LaMarre refused four such invitations, and eventually was adjudged in criminal contempt of the district court. In a memorandum decision the District Judge used the words "required" and "ordered" when speaking of LaMarre's appearance. The Sixth Circuit noted that while these words, like Judge Guinn's words, doubtless reflected the Judge's subjective intent, the word actually communicated to the defendant was the less mandatory word "request". In Re Joyce, 506 F.2d 373, 378 (5th Cir. 1975)

In the LaMarre case the claims manager was held in contempt under the power granted the court under 18 U.S.C. Section 401 which authorizes the court to impose a fine or imprisonment for "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command". While not decided under Rule 37, the LaMarre decision is useful in that it discusses the need for an order in the Sixth Circuit:

> To recapitulate, we believe that it goes without saying that the

> preceding "requests" of the District Judge which were entered on the court record, no matter how appropriate they may have been, were not orders which served to put LaMarre on notice that his freedom was in jeopardy if he failed to comply. This was knowledge that he was entitled to have. (LaMarre at 758-759)

In making its decision, the Sixth Circuit relied on a decision from the Second Circuit case of Berry v. Midtown, 104 F.2d 107 (2nd Cir. 1939) and quoted the following passage from that case:

> Before a person should be subject to punishment for violating a command of the court, the order should inform him of the definite terms as to the duties imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wise policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule. (Berry at 111)

Apparently the Sixth Circuit has been silent as to the necessity of an order before the application of sanctions specifically under Rule 37(b). However, the LaMarre decision shows that the circuit has not been silent as to the need for having an order in place where a person is "subject to punishment for violating a command of the court" and, indeed, the individual to be so subjected should be informed "in definite terms as to the duties imposed on him." It seems that the Sixth Circuit would not have dispensed with the need for a clear order of some type as readily as did both the District Court and the Court of Appeals for the Federal Circuit.

B. **Decision Inconsistent with U.S. Supreme Court Rulings**

The Court of Appeals for the Federal Circuit's decision to affirm the District Court's default holding also runs contrary to the holdings of at least two U.S. Supreme Court decisions that direct against the imposition of sweeping sanctions.

There were two counts in the complaint that were pending prior to the default judgment. One was for patent infringement, and the other was for tortious interference. Even though the failed inspection - the straw that broke the camel's back - was directed to the infringement count, the ultimate default sanction was not limited to discovery abuse as to the inspection, but was painted with a broad brush to penalize

Petitioners generally for what must have been perceived as overall bad conduct. This point cannot be disputed. If the district court objected singularly to the way Petitioners had conducted themselves in discovery as to the inspection, then the default sanction should have been limited to the count for patent infringement. But it swept far beyond that, and subsumed the unrelated count of tortious interference. This sort of "mere punishment" amounts to a denial of due process and is inconsistent with Hovey v. Elliott, 167 U.S. 409, 444-447 (1897). Such a sanction goes far beyond what was the intended result where a party disobeys a court order, even assuming that an order was in place.

Furthermore, even if there are grounds for the imposition of the sanction,

> the sanction must be specifically related to the particular 'claim,' which was at issue in the order to provide discovery. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982).

If the sanction was justified, the district court abused its discretion in making it so sweeping as to incorporate the count of tortious interference which is far different from the count of patent infringement. The default judgment should not have applied to both count, the Court of Appeals ignored the holdings of this Court in affirming the lower court decision.

C. **Courts of Appeal have issued Inconsistent Decisions**

The language of Fed. R. Civ. P. 37(b) provides that there must be an order in place prior its coming into force and, prior to entry of the order, there must be a motion for the order made in accordance with Rule 37(a). Fed. R. Civ. P. 37(b) is silent as to the form of the order. While the cases cited above by Petitioners offer some direction as to when default judgment should be imposed in the Sixth Circuit, that circuit apparently has not set forth the specific requirements as to the form of the order of Rule 37(b). And beyond the present case at the appellate level, the Court of Appeals for the Federal Circuit appears to have only considered two cases involving Rule 37(b) (Refac International Ltd. v. Hitachi Ltd.,

921 F.2d 1247 (Fed. Cir. 1990), and Tennant Co. v. Hako Minuteman Inc., 878 F.2d 1413 (Fed. Cir. 1989)). Neither case dealt with the form of the order necessary to impose sanctions.

A review of the remaining circuits fails to offer clarification, and, in fact, reveals considerable inconsistency caused by the lack of specifics as to the form of the order under Rule 37(b). Accordingly, Petitioners respectfully submit that the Supreme Court's exercise of its power of supervision is necessary to clarify and harmonize to the extent possible the application of this important Federal Rule.

Petitioners' request that the Supreme Court's resolve this dispute is far more than a request to perform an

academic exercise. The silence of the rule permits judges far too much discretion and often leads to the denial of due process, as was the situation for Petitioners at the district court level. While used as a matter of convenience by some judges to dispose of perhaps annoying cases, inconsistent interpretation of the requirements of the rule have harmful results on the defaulted party. The judge at the district court level of the present case used language that underscored <u>why</u> Rule 37(b) requires a clear order: "If defendants were dissatisfied with this order, it was incumbent upon them to appeal to the district judge, which they did not do." What, exactly, should Petitioners have appealed? The results of an in-chambers conference for which there was no record?

Orders are required to give form and predictability to the rule.

A review of the disparate and inconsistent holdings of the various circuits illustrates the potential for abuse by courts.

The Court of Appeals for the First Circuit held that a district court abused its discretion in dismissing a breach of contract action pursuant to Rule 37(b) for failing to answer certain deposition questions and for failing to produce certain documents where Plaintiffs filed no specific discovery order. With respect to the deposition questions, no order to compel existed. With respect to the production of documents, the Court of Appeals found that Plaintiffs' failure to produce did not violate a sufficiently explicit court order. R.W. International

Corp. v. Welch Foods, Inc., 937 F.2d 11 (1st Cir. 1991).

The Court of Appeals for the Second Circuit held that dismissal of an incarcerated prisoner's civil rights suit pursuant to Rule 37(b) because of plaintiff's refusal to answer selected ones of the questions during a deposition was improper, since plaintiff had not violated any explicit or implicit order. The only order in place was a Rule 30(a) order, but, the appellate court observed, that order did not specify what matters could or could not be inquired into at the deposition or what procedures were to be followed if a dispute arose over the manner of conducting the deposition. The court of appeals held that an order be in place before sanctions under Rule 37(b), and, failing this, no sanctions could be

imposed. Salahuddin v. Harris, 782 F.2d 1127 (2nd Cir. 1986).

Conversely,the Court of Appeals for the Fifth Circuit has held that where a party received adequate notice that certain discovery proceedings were to occur by a specific date and that party fails to comply, a court may impose sanctions without a formal motion to compel the discovery from the opposing party. In this instance there was a docket control order in place, yet a default judgment was entered under Rule 37(b) even though no order to compel was issued. McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482 (5th Cir. 1990).

Similarly, the Court of Appeals for the Seventh Circuit held that sanctions for failure to provide discovery

may be imposed even if no formal motion to compel discovery was filed. This assumes that "adequate notice" that certain discovery proceedings must occur by a specific date was provided. Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469 (7th Cir. 1984).

The Court of Appeals for the Ninth Circuit held that an oral order of the court in discovery proceedings that "unequivocally" gives notice that certain documents are to be produced is sufficient to support a Rule 37(b) sanction. Henry v. Sneiders, 490 F.2d 315 (9th Cir. 1974).

Yet in a case involving a request for reimbursement of costs and attorneys' fees incurred by a nonparty deponent, the Court of Appeals for the District of Columbia held that a motion to compel was first necessary for Rule 37(b)

to come into play. Westmorland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985).

Many such examples exist, and there is even inconsistencies within circuits (compare, for example, the Salahuddin of the Second Circuit cited above with Daval Steel Products v. M/V Fakredine, 951 F.2d 1357 (2nd Cir. 1991) in which 37(b) sanctions were imposed for failure to follow the oral order of the court). In fact, other than relatedness based on these cases being founded at least in part on Rule 37(b) issues, the inconsistencies are considerable and provide countless pitfalls for litigants. Rule 37(b) should provide order and predictability and should not risk loss of due process for failure of definiteness.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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